BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

THEODORE E. REIN,
SAMUEL G. CLAWSON,
Attorneys for Respondent.

THEODORE E. REIN,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

BLANK PAGE

INDEX.

	PAGE
Statement	1
The Question Presented	2
Argument:	
On its own assumptions Petitioner fails to show that the Commission is empowered to regulate intrastate sales merely because interstate competitors seek the same market	5
Section 5 of the Federal Trade Commission Act is directed not against methods of competition themselves intrastate in operation or against unfair methods used in the pursuit of intrastate business but, rather, against the use of unfair competitive methods in furtherance of the user's interstate trade	7
Reference to the legislative history of the Federal Trade Commission Act and to its purpose to supplement the Sherman Anti-Trust Act, fails to support Petitioner's contention that the Federal Trade Commission Act embraces intrastate sales methods such as are involved in the case at bar	14
The contention of Petitioner that intrastate methods of sale competing with interstate commerce are cognizable under the Act, is tantamount to the proposition that the Commission has jurisdiction over intrastate acts affecting interstate commerce. Both Congress and the courts have recognized that the words "in commerce" do not confer jurisdiction over acts "affecting" commerce	21

PA

Even if the words "affecting commerce" could, by judicial interpretation, be read into the Federal Trade Commission Act, federal jurisdiction derived from the Commerce Clause extends to such intrastate transactions only as directly affect interstate commerce .....

The insufficiency of the Commission's findings of fact upon which the Commission's ruling was predicated, alone requires the disapproval and reversal of the cease and desist order .....

Conclusion .....

TABLE OF CITATIONS.

Cases.

Abouaf v. Spreckels Co. (D. C. Cal.), 26 Fed. Supp. 830 .....18, 3

American Can Co. v. Ladoga Canning Co. (C. C. A. 7), 44 Fed. (2d) 763 .....

American Tobacco Co. v. Federal Trade Commission, (C. C. A. 2), 9 Fed. (2d) 570 .....

Anderson v. United States, 171 U. S. 604.....

Andrew Jergens Co. v. Woodbury (D. C. Del.); 271 Fed. 43 .....

Apex Hosiery Co. v. Leader, 310 U. S. 469.....17, 2

Arthur v. Kraft-Phoenix Cheese Corp. (D. C. Maryland), 26 Fed. Supp. 824 .....

Atlantic Coast Line R. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257.....

B. S. Pearsall Butter Co. v. Federal Trade Commission (C. C. A. 7), 292 F. 720..... 17, 41

Blankenship v. Kurfman (C. C. A. 7), 96 F. (2d) 450 .....18, 25, 27

Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436 18

Bunte Bros. v. Federal Trade Commission, 104 Fed. (2d) 996 .....

PAGE

TABLE OF CITATIONS (continued).

Cases (continued).

C. E. Stevens Co. v. Foster & Kleiser (C. C. A. 9), 109 Fed. (2d) 764 18

California Rice Industry v. Federal Trade Commission, (C. C. A. 9), 102 F. (2d) 716 ..... 10, 27, Appendix B-1

Canfield Oil Co. v. Federal Trade Commission (C. C. A. 6), 274 Fed. 571 ..... 11, Appendix B-3

Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8), 13 Fed. (2d) 673 28

Chicago & Eastern Ill. R. Co. v. Industrial Commission, 284 U. S. 296 24

Corey v. Independent Ice Co. (D. C. Mass.), 207 Fed. 459 42

Curtis Pub. Co. v. Federal Trade Commission, (C. C. A. 3rd) 270 Fed. 881 41

Deputy v. DuPont, 308 U. S. 488 7

Eastern States Lumber Co. v. United States, 234 U. S. 600 28

Ewing-Von Almen Dairy Co. v. C. & C. Ice Cream Co. (C. C. A. 6), 109 Fed. (2d) 898 18

Federal Trade Commission v. Beechnut Packing Co., 257 U. S. 441 20

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 ..... 17, 41

Federal Trade Commission v. Gratz, 253 U. S. 421 17

Federal Trade Commission v. Keppel & Bro. Inc., 291 U. S. 304 ..... 12, 20

Federal Trade Commission v. F. A. Martocio Co., (C. C. A. 8), 87 Fed. (2d) 561 12

Federal Trade Commission v. Mid West Mills, (C. C. A. 7), 90 Fed. (2d) 723 10

PAGE

TABLE OF CITATIONS (continued).

Cases (continued).

Federal Trade Commission v. Paramount Famous-Lasky Corp. (C. C. A. 2), 57 Fed. (2d) 152 17
Federal Trade Commission v. Raladam Co., 283 U. S. 643 ..... 9, 10, 19, 21, 43
Federal Trade Commission v. Royal Milling Co., 288 U. S. 212 10
Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 464 ..... 17, 19
Foster & Kleiser Co. v. Special Site Sign Co., (C. C. A. 9), 85 Fed. (2d) 742 18

Helen Ardelle v. Federal Trade Commission, (C. C. A. 9), 101 Fed. (2d) 718 12
Houston East & West Texas Railway Co. v. United States, 234 U. S. 342 29

Illinois Central Ry. Co. v. Behrens, 233 U. S. 473 24
Industrial Ass'n of San Francisco v. United States, 268 U. S. 64 ..... 18, 39, 40

John Bene & Sons v. Federal Trade Commission, (C. C. A. 2d), 299 Fed. 468 41

L. B. Silver Co. v. Federal Trade Commission, (C. C. A. 6th) 289 Fed. 985 41
Leader v. Apex Hosiery Co. (C. C. A. 3), 108 Fed. (2d) 71. (Affirmed in Apex Hosiery Co. v. Leader, supra) 25, 27
Levering & Garrigues Co. v. Morrin, 289 U. S. 103 ..... 17, 39
Lipson v. Socony Vacuum Corp. (C. C. A. 1), 87 Fed. (2d) 265 ..... 26, 42
Lipson v. Socony-Vacuum Corp. (C. C. A. 1), 76 Fed. (2d) 213 26
Loewe v. Lawlor, 208 U. S. 274 28

PAGE

TABLE OF CITATIONS (continued).

Cases (continued).

Moore v. New York Cotton Exchange, 270 U. S. 593 ..... 17, 38, 40
Mulford v. Smith, 307 U. S. 38 25

Nash v. United States, 229 U. S. 373 28
National Harness Manufacturers Ass'n v. Federal Trade Commission, 268 Fed. 705 27
New Jersey Asbestos Co. v. Federal Trade Commission, (C. C. A. 2d), 264 Fed. 509 41
N. L. R. B. v. Idaho-Maryland Mines Corp. (C. C. A. 9), 98 Fed. (2d) 129 39
N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 25

Ostler Candy Co. v. Federal Trade Commission (C. C. A. 10), 106 Fed. (2d) 962. (Certiorari denied, 309 U. S. 675) 12

Port & Co. v. Girdler, (N. Y. Sup. Court, Nov. 1939) CCH Trade Regulations No. 25,347 26

Riley Investment Co. v. Commissioner of Internal Revenue — U. S. — (dec. Nov. 12, 1940) 21

Schechter v. United States, 295 U. S. 495 ..... 26, 38, 40
Schneider v. Lehigh Valley R. Co. (C. C. A. 2), 112 Fed. (2d) 712 24
Shanks v. Delaware L. & W. R. Co., 239 U. S. 556 24
Stafford v. Wallace, 258 U. S. 495 37
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 25
Swift v. United States, 196 U. S. 375 37

United Leather Workers v. Herkert, 265 U. S. 457 ..... 18, 39
United States v. F. W. Darby Lumber Co. (D. C. Ga.), 32 Fed. Supp. 734 26

PAGE

TABLE OF CITATIONS (continued).

Cases (continued).

United States v. Great Western Sugar Co. (D. C. Neb.), 39 Fed. (2d) 149 18

United States v. Southern California Wholesale Grocers Ass'n (D. C. Cal.), 7 Fed. (2d) 944.....18, 39, 40

United States v. Stewart, — U. S. —, (decided Nov. 12, 1940, 85 L. ed., Advance Opinions, pages 25, 28) 13

Utah-Idaho Sugar Co. v. Federal Trade Commission, (C. C. A. 8), 22 Fed. (2d) 122 ..... 11, Appendix B-3

Ward Baking Co. v. Federal Trade Commission, (C. C. A. 2), 264 Fed. 330 ..... 10, 42

Ware & Leland v. Mobile County, 209 U. S. 404..... 39

Winslow v. Federal Trade Commission (C. C. A. 4th), 277 Fed. 206 ..... 11, 42, Appendix B-2

Statutes.

Agricultural Adjustment Act 25

Bituminous Coal Conservation Act 25

Clayton Act 26

Fair Labor Standards Act 26

Federal Employers Liability Act..... 23, 24

Federal Trade Commission Act 3

Interstate Commerce Act 29

National Labor Relations Act 25

Sherman Act 6, 15, 16

Wheeler-Lea Amendment 9, 13

Miscellaneous.

James A. Fayne, The Federal Trade Commission: The Development of the Law Which Led to its Establishment. 9 American Political Science Review, pp. 57 *et seq.* (1915) .....Appendix C-1

PAGE

Miscellaneous (continued).

F. D. G. Ribble, State & National Power Over Commerce (Columbia Legal Studies, III, 1937) 35

Gerard C. Henderson, The Federal Trade Commission (1924) 41

W. H. S. Stevens, The Trade Commission Act. 4 American Economic Review, pp. 840 *et seq.* (1914) ..... Appendix C-1

63rd Congress, 2nd Session, House of Representatives, Report No. 533 ..... Appendix C-1

63rd Congress, 2nd Session, Senate Report No. 597 14, Appendix C-1

63rd Congress, 2nd Session, House of Representatives Report No. 1142 ..... Appendix C-1

63rd Congress, 2nd Session, House of Representatives Debates ..... Appendix C-1

63rd Congress, 2nd Session. Senate Debates..Appendix C-1

74th Congress, 1st Session. Senate Debates on S. 944 22

74th Congress, 2nd Session, Senate Debates 23

74th Congress, 2nd Session, Hearing Before the Committee on Interstate and Foreign Commerce on S. 3744 ..... Appendix A-10

75th Congress, 1st Session. Senate Report No. 221 ..... Appendix A-1

75th Congress, 1st Session. House of Representatives Report No. 1613 ..... Appendix A-4

75th Congress, 1st Session. Hearing Before the Committee on Interstate and Foreign Commerce on H. R. 3143 ..... Appendix A-6

75th Congress, 3rd Session. House Report No. 2182 26

BLANK PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

STATEMENT.

At the outset, it is to be observed that the record herein discloses no commercial practice of the Respondent intended to impair or impede the interstate business of others selling similar products. The cease and desist order of the Commission, for which approval is here sought, seeks to enjoin the Respondent from selling and distributing, supplying to or placing in the hands of dealers, and packing

or assembling, packages of candy or other confections which may be used to conduct a lottery, game of chance or gift enterprise in the sale and distribution of such merchandise to the ultimate consumer, all of which takes place in the State of Illinois (R. 318).

The distribution and sale of such merchandise *in interstate commerce* has heretofore been held unlawful under the Federal Trade Commission Act. It is not claimed by Petitioner that such practices are unlawful under any law of Illinois or under any law of the United States except the Federal Trade Commission Act. The sale and distribution of Respondent's merchandise is alleged to be unlawful only when it is brought into competition with the interstate business of outside sellers who may elect to seek a market for their goods in Illinois.

The court below, finding that Respondent's business under attack by the Commission was wholly *intrastate*, decided the case upon a single issue of law, treating, in its opinion, only the scope and effect of Section 5 of the Federal Trade Commission Act and, having concluded that the intrastate business of Respondent did not come within the purview of the statute, found it unnecessary to consider the sufficiency of the Commission's findings of fact.

The Question Presented.

In its petition for the writ of certiorari the Commission stated the question presented to this court as follows:

> "Does the Federal Trade Commission have power to prohibit unfair methods of competition in connection with intrastate sales which reduce the quantity and divert the course of interstate sales and shipments?" (Pet. p. 2).

In its brief, filed after the issuance of the writ, the Commission now formulates the question before this court as follows:

> "Whether the competition between companies selling in interstate commerce and a company selling in intrastate commerce is 'competition in (interstate) commerce' and whether the unfair methods used in such competition by the intrastate seller are 'unfair methods of competition in (interstate) commerce', within the meaning of the Federal Trade Commission Act" (Pet. Br. p. 2).

It will be noted that the question as presented in the petition for the writ of certiorari made the jurisdiction of the Commission depend upon the applicability of the Federal Trade Commission Act to unfair methods of competition in intrastate commerce which *affect* interstate commerce in such manner as to reduce the quantity and divert the course of interstate sales and shipments. The question as now presented seeks to avoid the distinction between methods of competition *in* interstate commerce and methods of competition *affecting* interstate commerce by isolating certain words of the statute which must be read and construed in their complete context.

The statute, unamended, under which this proceeding is prosecuted, reads:

> "Unfair methods of competition in commerce are declared unlawful.
>
> "The commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce" (38 Stat. 719; 15 U. S. C. Sec. 45).

"Commerce" is defined as "commerce *among the several states* or with foreign nations, * * *" (38 Stat. 719; 15 U. S. C. Sec. 44).

It is thus apparent that the meaning of the words, "competition in interstate commerce," is not the question before this Court. The question is, rather, whether the Respondent, by its challenged practices, is "using unfair methods of competition in interstate commerce." Specifically applied to the facts of the case at bar, the question is whether the sale and distribution of merchandise which take place within one state only, can be considered as "using unfair methods of competition in [interstate] commerce."

ARGUMENT.

I.

ON ITS OWN ASSUMPTIONS PETITIONER FAILS TO SHOW THAT THE COMMISSION IS EMPOWERED TO REGULATE INTRASTATE SALES MERELY BECAUSE INTERSTATE COMPETITORS SEEK THE SAME MARKET.

Petitioner argues that because of the essentially two-sided nature of competition, competition in interstate commerce is present if but one of the competitors be engaged in interstate commerce. The statute does not predicate the jurisdiction of the Commission upon the presence of competition in interstate commerce, but authorizes it, only, to prevent persons from using unfair methods of competition in interstate commerce. However, even if this language of the statute be disregarded and jurisdiction of the commission be attached solely to competition in interstate commerce, it by no means follows that such competition is present when only one of the two necessary adversaries engages in interstate commerce. From Petitioner's own argument, the logical conclusion would seem to be that, in order to constitute competition in interstate commerce, which, by Petitioner's definition, necessarily requires at least two participants, both parties must operate in the field of interstate commerce.

Petitioner further argues that because of that two-sided character of interstate competition, the distinction between practices *in* interstate commerce and practices *affecting* interstate commerce, has no place in construing the scope of the Act, and that intrastate practices competing with interstate commerce come within the words

"competition in interstate commerce." In support of this contention, however, the Commission relies solely on cases arising under the Sherman Act which deal with intrastate activities *affecting* interstate commerce (the courts also having found that the practices there under consideration *directly* affected interstate commerce) and certain other cases upholding the jurisdiction of the Commission over intrastate practices *affecting* interstate commerce which violated the Sherman Act.

The third pillar of Petitioner's argument is that the Federal Trade Commission Act, being supplementary to the Sherman Act, should be so construed as to effectuate the policy of the earlier statute and should be given an equally wide application. The Sherman Act, however, was expressly designed to curb combinations and conspiracies in intentional restraint of interstate commerce. In the present proceeding, the Commission attempts to regulate standards of competition without any finding that there existed a combination or conspiracy in restraint of interstate commerce. The Sherman Act, moreover, was held to extend to intrastate combinations and conspiracies only if they "directly" affected interstate commerce, and the courts have held, without exception, that an incidental reduction of interstate commerce brought about solely by local competition, does not constitute a direct interference with interstate commerce.

It follows that even if the assumptions of Petitioner on which its argument is based, be taken as correct, they are insufficient to support the conclusion that the Federal Trade Commission Act authorizes the Commission to regulate intrastate sales on the ground that they are in competition with the business of others who are engaged in interstate commerce.

II.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IS DIRECTED NOT AGAINST METHODS OF COMPETITION THEMSELVES INTRASTATE IN OPERATION OR AGAINST UNFAIR METHODS USED IN THE PURSUIT OF INTRASTATE BUSINESS BUT, RATHER, AGAINST THE USE OF UNFAIR COMPETITIVE METHODS IN FURTHERANCE OF THE USER'S INTERSTATE TRADE.

A.

In ascertaining the legitimate scope of jurisdiction of the Commission the first and principal guide is, of course, the language of the statute itself. It is to be assumed that in enacting this statute Congress used the words employed in their ordinary and commonly accepted meaning. *Deputy* v. *Du Pont,* 308 U. S. 488, 498.

By the language of the Act the Commission is empowered to prevent persons "from using unfair methods of competition in [interstate] commerce." It would be doing violence to the ordinary rules of grammar to say that this language covers the use of unfair methods of competition *with* the interstate commerce of others. The only possible deduction from this language is that the injunctive order of the Commission must pertain to unfair methods of competition which themselves are used in interstate commerce.

Petitioner argues that the question at issue before the court is concerned only with the meaning of the words "competition in commerce" (Pet. Br. p. 8), that competition between goods sold in intrastate and those sold in interstate commerce is competition "in" interstate commerce and that the use of unfair methods of distribution by one who sells intrastate in competition with interstate

commerce constitutes a use "of unfair methods of competition in interstate commerce" (Pet. Br. p. 9).

To arrive at this result it was necessary for Petitioner to sever the words "competition in commerce" from the clause in which they were used. The whole phrase "from using unfair methods of competition in commerce" permits of no such dissection, the language expressing, as it does, a single, coherent, legislative thought.

Having isolated the words, "competition in commerce" from the preceding language, "using unfair methods of", Petitioner proceeds to argue that the presence of "competition in interstate commerce" alone is sufficient to sustain the exercise of the Commission's jurisdiction whether or not the methods sought to be enjoined are used in interstate commerce. It contends, in effect, that the statute prohibits the use of "unfair methods *in* competition in interstate commerce." Even if the statute contained language to that effect, it does not follow that "competition in interstate commerce" exists although the Respondent's methods are not used in the course of interstate commerce. The phrase "competition in interstate commerce" implies logically that all of the contending forces which are necessary to constitute a competitive situation move and meet in interstate commerce.

The words "competition in commerce" cannot be given an independent jurisdictional meaning. The language of the empowering clause clearly limits the jurisdiction of the Commission to prevent respondents to its proceedings "from *using* unfair *methods* * * * in [interstate] commerce." As indicated by the connecting preposition "of", the word "competition" is employed in a descriptive sense as qualifying the "methods" which, if unfair, are preventable under the Act.

Without being further explained by the adjective phrase "of competition", the term "methods" would be meaningless. All "methods" adopted and used in the prosecution of interstate trade are not denounced by the statute. As was held in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649, to come within the prohibition of the Act, the methods must be "methods *of competition*".

The Wheeler-Lea Amendment, which was proposed and actively sponsored by members of the Federal Trade Commission, added to the statute the words, "and unfair or deceptive acts or practices in commerce." (52 Stat. 111; 15 U.S.C.A. Sec. 45.) The only purpose of this amendment was to give the Commission jurisdiction over unfair trade practices in interstate commerce without the necessity of proving the existence of, or injury to, competitors of the respondent.[1] It was not intended to effect any change with respect to the jurisdictional requirement appertaining to interstate commerce. Hence it is evident that the phrase, "unfair or deceptive acts or practices" was intended to serve as a basis for injunctive proceedings whenever, due to the absence of injury to competitors, the first clause of the statute relating to the use of unfair methods of competition should be unavailing. With respect to the presence of interstate commerce, both the unfair methods of competition and the unfair or deceptive acts or practices must be "in" interstate commerce.

B.

The courts in construing the Federal Trade Commission Act have uniformly recognized that the Commission is without authority to regulate methods of competition which are practiced merely in connection with respondent's intrastate business.

---

[1] See Appendix A.

In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647, the prerequisites of the Commission's jurisdiction were stated as follows:

> "By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) That the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, the court, following the *Raladam* case, held at page 216:

> "To sustain the orders of the commission, three requisites must exist: (1) That the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public."

See, also, *Federal Trade Commission* v. *Mid West Mills*, (C. C. A. 7), 90 Fed. (2) 723, 724.

The limitation upon the power of the Commission to regulate only those unfair trade methods which are themselves practiced in interstate commerce is also recognized in:

California Rice Industry v. *Federal Trade Commission* (C.C.A. 9th), 102 Fed. (2d) 716, 723.

Ward Baking Co. v. *Federal Trade Commission* (C.C.A. 2d), 264 Fed. 330, 331.

Winslow v. *Federal Trade Commission* (C.C.A. 4th), 277 Fed. 206.

Utah-Idaho Sugar Co. v. *Federal Trade Commission* (C.C.A. 8th), 22 Fed. (2d) 122, 125.

Canfield Oil Co. v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, 574, 575.

See Appendix B for excerpts from above cases.

C.

It is a familiar rule that in ascertaining the scope and meaning of a statute, the construction placed upon it by continuous, administrative practice is of great weight.

Except for occasional excursions, the Commission, in exercising its powers and functions under the statute, followed a well-recognized path in selecting for prosecution and prosecuting only those alleged violators who were themselves engaged in interstate commerce. From such practical, uniform course of administration may be perceived the acceptance by the Commission of the view that it was empowered, only, to prevent parties engaged in interstate commerce from using unfair methods of competition in the pursuit of interstate business.

With respect to the particular trade practice involved in this case, it is also noteworthy that prior to the commencement of this proceeding the Commission had consistently confined its complaints and orders to the use of such practices by the respondent in connection with interstate sales and shipments. While, according to the theory advanced by Petitioner in this case, it is equally important to determine whether the injured competitor is engaged in interstate commerce and there is thus present a situation in which both parties participating in the competition are engaged in interstate commerce, the Commission, in the great majority of cases, did not consider it necessary

to make any findings as to whether or not the trade of the adversary was interstate in scope.[2]

D.

The unfounded assertion of Petitioner that the Federal Trade Commission Act governs intrastate sales when there exists a competitor who is engaged in interstate commerce, would, if accepted, create an anomolous situation. Under the first clause of Section 5, unfair methods of competition in interstate commerce are declared unlawful, but the unlawfulness of the sales methods of an intrastate operator, under Petitioner's contentions, is made dependent, not upon some inherent vice or illegality but, on the contrary, upon the advent of competition in the same market by another seller engaged in interstate commerce, a circumstance utterly beyond the control of the intrastate operator and as to which he would have no notice.

In other words, the construction contended for by the Commission, would make the lawfulness or unlawfulness of intrastate sales methods dependent upon the presence or absence of an interstate competitor who, at any time, might elect to cross the state line and compete with the intrastate operator whose trade practices theretofore were wholly lawful under the laws of the state wherein the business be transacted and lawful, indeed, even under federal law.

In contrast with this unpredictable and unknowable illegality of intrastate methods of competition, the "un-

---

[2] See, *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 306; *Ostler Candy Co.* v. *Federal Trade Commission* (C.C.A. 10), 106 Fed (2d) 962, 964 (certiorari denied, 309 U. S. 675); *Bunte Bros.* v. *Federal Trade Commission*, 104 Fed. (2d) 996, 997; *Helen Ardelle* v. *Federal Trade Commission* (C.C.A. 9), 101 Fed. (2d) 718, 719; *Federal Trade Commission* v. *F. A. Martocio Co.* (C.C.A. 8), 87 Fed. (2d) 561, 562, 564.

fair or deceptive acts or practices" which were added to the statute by the Wheeler-Lea amendment, are clearly unlawful only when practiced in interstate commerce. Such result, which would inevitably follow from Petitioner's contention, would contradict the avowed purpose of the Wheeler-Lea amendment that the addition of the clause "unfair or deceptive acts or practices in commerce" was merely to dispense with the necessity of proving the existence of, or injury to, competitors.[3] Whether or not the competitor or competitors whose existence was deemed necessary prior to the amendment were engaged in interstate commerce, was regarded as immaterial in the consideration and adoption of the amendment.

It is reasonable to assume that the first clause of Section 5, relating to unfair methods of competition in commerce, and the second clause appertaining to unfair or deceptive acts or practices in commerce, both clauses being contained in the same sentence of the statute, were intended by Congress to possess the same scope of applicability to interstate commerce. The Wheeler-Lea amendment which makes it abundantly clear that any unfair acts or practices, to come within the jurisdiction of the Trade Commission, must be used in interstate commerce, can, therefore, be regarded as the legislative interpretation of the first clause of Section 5 in the sense that the unfair methods of competition therein described, must likewise be practiced in interstate commerce. (See *U. S.* v. *Stewart*, — U. S. — (decided November 12, 1940, 85 L. ed., Advance Opinions, pages 25, 28.)

---

[3] See Appendix A.

III.

REFERENCE TO THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT AND TO ITS PURPOSE TO SUPPLEMENT THE SHERMAN ANTI-TRUST ACT, FAILS TO SUPPORT PETITIONER'S CONTENTION THAT THE FEDERAL TRADE COMMISSION ACT EMBRACES INTRASTATE SALES METHODS SUCH AS ARE INVOLVED IN THE CASE AT BAR.

Petitioner contends that the Trade Commission Act, being supplementary to the Sherman Anti-Trust Act, was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed, and that it should be given an equally wide application. From this it by no means follows, however, that Congress intended, at the time of the passage of the Federal Trade Commission Act, to give the Commission jurisdiction over intrastate sales of merchandise, the circulation of which is confined within the boundaries of a single state.

The reports and proceedings of Congress[4] make it evident that the methods of competition sought to be regulated by the statute were assumed to be methods of competition adopted by persons engaged in interstate commerce in furtherance of their own interstate operations. The question foremost in the mind of Congress was concerned with the creation of an administrative tribunal which by special training and experience would be particularly fitted to deal with the problem of maintaining the freedom of interstate commerce against trusts and monopolies.[5]

---

[4] See Appendix C.

[5] Senate Report 597, 63rd Congress, 2nd Session, pp. 8, 13, 32, 38.

Another discussion of major importance was concentrated upon the meaning of the term "unfair methods of competition." The principal function of the administrative agency as conceived by Congress was to deal with the abuses of competition practiced by the giants of interstate commerce which threatened to absorb or eliminate their less powerful competitors. Throughout the congressional proceedings, it was never even suggested that the Commission should be authorized to interfere with sales methods which do not cross state lines. It is significant that the very name originally contemplated for the Commission was, "Interstate Trade Commission", which was abandoned only in order to avoid confusion with the Interstate Commerce Commission.[6]

An investigation of the circumstances of the passage of the Federal Trade Commission Act furnishes, therefore, no support for the contention that Congress intended to invest the Commission with jurisdiction over intrastate sales methods.

By relying on the Sherman Act as an aid in the construction of the Trade Commission Act, Petitioner attempts to go beyond the statute itself. It is a fundamental rule of construction that reference to extraneous materials cannot serve to place a construction on the statute inconsistent with its apparent meaning. But reference to the Sherman Act is of no help in determining the applicability of the Trade Commission Act to the issue at bar. The Sherman Act possesses a definite objective which is stated in unmistakable terms in the language of the Act itself, Section 1 of which provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

---

[6] Congr. Rec., Vol. 51, Part 15, p. 14924.

commerce among the several states, or with foreign nations, is declared to be illegal." (26 Stat. 209; 15 U. S. C. Sec. 1.)

Section 2 of the Sherman Act provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * * ". (26 Stat. 209; 15 U. S. C. Sec. 2.)

The language of the foregoing provisions discloses that Congress was striking at contracts, combinations and conspiracies in restraint of trade or commerce and at monopolies, actual or attempted or contemplated by a combination or conspiracy. Section 1, therefore, in effect, makes unlawful conspiracies in restraint of commerce, and Section 2 declares to be illegal the monopolization or conspiracy or attempt to monopolize trade or commerce.

Two distinct prerequisites have been evolved for the application of the Act: (1) There must be a combination, conspiracy or other concerted action to restrain commerce, or an actual monopoly or attempt to monopolize a business or industry; (2) The challenged activities must be aimed at interstate commerce and where these activities take place wholly within one state there must be an intention to restrain interstate commerce.

Respondent has no quarrel with the proposition that the Commission is authorized to institute proceedings for violations of the Sherman Act. Where certain trade practices are violative of federal law because they contravene the prohibitions of the Sherman Act, they constitute, also, unfair methods of competition in interstate commerce within the scope of the Federal Trade Commission Act.

However, in the absence of a violation of the Sherman Act or of any other federal law for the protection of interstate commerce, the Trade Commission is authorized to enjoin trade practices which are considered unfair only if the Respondent is engaged in interstate commerce and uses the unfair methods in furtherance of his interstate business.

In the following group of cases, proceedings by the Federal Trade Commission were dismissed on the distinct ground that the evidence did not show a combination or other concerted action or a monopoly or an unlawful discrimination by the defendants:

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 464, 473.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 581.

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 428.

B. S. Pearsall Butter Co. v. *Federal Trade Commission* (C. C. A. 7), 292 Fed. 720, 722.

Federal Trade Commission v. *Paramount Famous-Lasky Corp.* (C. C. A. 2), 57 Fed. (2d) 152, 157.

American Tobacco Co. v. *Federal Trade Commission*, (C. C. A. 2) 9 Fed. (2d) 570, 582.

In the following line of cases, actions under the Sherman Act were dismissed by reason of the fact that the intrastate activities on which the charges were based, had primarily a local object and were not directed at the restraint or monopolization of interstate commerce:

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, 486, 490, 495, 498.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 107.

Moore v. *New York Cotton Exchange, et al.*, 270 U. S. 593.

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, 80.

United Leather Workers v. *Herkert*, 265 U. S. 457, 471.

Blumenstock Bros. v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

C. E. Stevens Co. v. *Foster & Kleiser Co.*, (C. C. A. 9), 109 Fed. (2d) 764.

Foster & Kleiser Co. v. *Special Site Sign Co.* (C. C. A. 9), 85 Fed. (2d) 742.

Ewing-Von Almen Dairy Co. v. *C. & C. Ice Cream Co.* (C. C. A. 6), 109 Fed. (2d) 898.

Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450.

Abouaf v. *Spreckels Co.* (D. C. Cal.), 26 Fed. Sup. 830, 833.

United States v. *Great Western Sugar Co.* (D. C. Neb.), 39 Fed. (2d) 149, 151.

United States v. *Southern California Wholesale Grocers Assn.* (D. C. Cal.), 7 Fed. (2d) 944, 947.

Andrew Jergens Co. v. *Woodbury* (D. C. Del.), 271 Fed. 43.

In the case at bar, admittedly, there is no evidence and consequently there could be no finding, that the Respondent was guilty of either of the two prerequisite factors of liability, both of which are necessary to sustain a charge under the Sherman Act. Respondent did not participate in a conspiracy or other concerted action, nor did it attempt to monopolize the business in which it was engaged. Respondent, moreover, had no intention of restraining interstate commerce, the sole object of its criticized practices being the sale of its goods within the State of Illinois.

It follows as an inescapable conclusion that reference to the Sherman Act does not furnish a guide in determining the applicability of the Trade Commission Act to

methods of competition which do not themselves constitute combinations and conspiracies in restraint of trade. None of the cases cited or quoted from by Petitioner, at page 10 of its brief, supports the point in connection with which they are mentioned.

In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, this court affirmed the decree of the Circuit Court of Appeals by which an order of the Federal Trade Commission was reversed for the reason that respondent had no substantial competition which was or could have been injured by use of the unfair methods. It is evident that the language quoted in Petitioner's brief was a mere dictum since the unfair methods of competition involved were practiced in interstate commerce. If the court had held, in accordance with Petitioner's argument, that the provisions of the Sherman Act could be used to enlarge the scope of the Federal Trade Commission Act, it might well have disregarded the absence of an injured competitor which is not required by the Sherman Act. The case affords a strong reason for the conclusion that, although the court said that Section 5 of the Trade Commission Act is supplementary to the Sherman Act, the power of the Trade Commission is, nevertheless, confined to the jurisdictional prerequisites which are to be found, not in the Sherman Act, but in the Trade Commission Act itself.

In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, the court likewise affirmed a judgment of the Circuit Court of Appeals vacating certain orders of the Federal Trade Commission for the reason that the challenged practices, while used in interstate commerce, were not against the public policy of the United States. Petitioner's quotation from the opinion of Mr. Justice McReynolds, if considered in its context, has not the remotest bearing upon the issue at bar.

In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, (in which Justices Holmes, Brandeis, McReynolds and McKenna dissented from the majority opinion) the court found that the respondent had adopted and enforced a nationwide scheme of fixing and maintaining certain specified standard prices at which its products were to be re-sold. This scheme, therefore, came directly within the prohibitions of the Sherman Act involving as it did concerted action with the intent to restrain interstate commerce and being plainly violative of federal public policy. It constituted an unfair method of competition in interstate commerce. The opinion as well as the actual holding of that case have no relevancy to the instant situation.

In *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, the unfair methods of competition before the court involved the actual interstate sales and shipment in interstate commerce of chance candies. Since these practices did not come within the "familiar methods of law violation which prosecutions under the Sherman Act had disclosed," the language quoted by Petitioner is completely inconclusive as to the question now before this court.

The "great purpose" of the Sherman Act and of the other acts adopted by Congress to supplement the policy of the Sherman Act must be understood in the light of the specific language and provisions of these separate statutes.

Congressional intention of what is sought to be regulated is primarily ascertainable from its expressions in the particular statute invoked. If the Federal Trade Commission Act fails to carry into effect what Petitioner considers as its "great purpose", this does not furnish a reason for en-

larging the powers of the Commission beyond those conferred upon it by the express language of the Act itself.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 649.

Riley Investment Co. v. *Commissioner of Internal Revenue*, — U. S. — (decided November 12, 1940, 85 Law ed., Advance Opinions, pp. 35, 37).

IV.

THE CONTENTION OF PETITIONER THAT INTRASTATE METHODS OF SALE COMPETING WITH INTERSTATE COMMERCE ARE COGNIZABLE UNDER THE ACT, IS TANTAMOUNT TO THE PROPOSITION THAT THE COMMISSION HAS JURISDICTION OVER INTRASTATE ACTS AFFECTING INTERSTATE COMMERCE. BOTH CONGRESS AND THE COURTS HAVE RECOGNIZED THAT THE WORDS "IN COMMERCE" DO NOT CONFER JURISDICTION OVER ACTS "AFFECTING" COMMERCE.

Confronted by the unanswerable decisions of this and other courts drawing a clear line of demarcation between the words "in commerce" and the words "affecting commerce", Petitioner, in an effort to escape the effect of these adjudications, enters into a dissertation, as has been said, on the two-sided nature of competition, attempting, in this connection, to divert attention from the coherent unity of the entire statute by concentrating its argument on the language "competition in commerce". Intrastate sales methods which may *compete* with interstate commerce are methods, of course, which may *affect* interstate commerce. The discussion of the nature of competition and the attempted dissection of the Act do not obscure the question genuinely presented upon this phase of the controversy, *i. e.*, is the language "unfair methods of competition *in* [*interstate*] *commerce*" synonymous with the expression

"unfair methods of competition *affecting* [interstate] commerce"?

In the course of the congressional deliberations preceding the enactment of the Wheeler-Lea Amendment, (74th Congress, 1st Session,) Senate Bill No. 944 provided for an amendment of Section 5 of the Trade Commission Act to read as follows:

> "Unfair methods in *or affecting* commerce and unfair or deceptive acts in *or affecting* commerce, are declared unlawful.
>
> "The Commission is empowered and directed to prevent persons * * * from using unfair methods in or affecting commerce and unfair or deceptive acts in *or affecting* commerce." (Italics supplied.)

This bill having been reported back from the Senate Committee on Interstate Commerce, with recommendation for adoption, became the subject of an extended debate in the Senate.[7] Upon a motion to reconsider the approval of the bill because the full import of the amendment had not been realized, Senator Wheeler stated:

> "The only modification of the paragraph to which the senator calls attention is the insertion of the words, 'or affecting' ".

Senator Austin replied:

> "Yes, Mr. President; but apparently that is what is the trouble with the bill. Congress has gone as far as it had any right to go when it undertook to regulate and to deal with unfair trade practices in commerce * * *".

---

[7] 74th Congress, 1st Session, Senate Debates. Congressional Record, Vol. 79, Part II, pages 1842 *et seq.*

Senator King remarked:

"As I understand the senator's position is that the language of this provision is too broad and that it would give to the Commission the right to go into a state and investigate intrastate commerce exclusively where it clearly and obviously was intrastate instead of interstate commerce."

Senator Austin said:

"I do take that position. * * *"

Senator Borah stated:

"I do not think we can authorize the Trade Commission to deal with intrastate affairs. I think if we should undertake to do so, our action would be held invalid. * * *"

The original adoption of the amendment having been reconsidered, the bill went over and was not brought up again before the end of the First Session of Congress. A new bill (Senate Bill 3744) which significantly omitted the words "or affecting" was introduced in the Second Session of the 74th Congress and was subsequently enacted into law.[8]

Another indisputable recognition by Congress of the distinction between the scope of statutory language reading "in commerce" and language covering situations "affecting commerce", is found in the legislative history of the Second Federal Employers' Liability Act. The statute, as enacted in 1908, provided:

"Every common carrier by railroad while engaged in commerce between any of the several States or ter-

[8] 74th Congress, 2nd Session, Senate Debates. Congressional Record, Vol. 80, pages 6588 *et seq.*, 6603, 6702.

ritories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

In construing this Act, the phrase "employed in interstate commerce" was held by the courts to mean that the injured employee, at the time of the injury, must be actually engaged in interstate transportation, or in work so closely related to it as to be practically part of it. Employment in occupations which ultimately affect the interstate movement of goods was held not to come within the terms of the Act.

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556, 558.

Ill. Central Ry. Co. v. *Behrens*, 233 U. S. 473, 478.

Chicago & Eastern Ill. Ry. Co. v. *Industrial Commission*, 284 U. S. 296, 299.

Schneider v. *Lehigh Valley R. Co.* (C. C. A. 2), 112 Fed. (2) 712, 713.

For the express purpose of broadening the scope of the Act so as to include employees engaged in interstate operations affecting interstate commerce, Congress, in 1939, amended the Act by adding the following clause:

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; *or shall, in any way directly or closely and substantially, affect such commerce* as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has

been or may hereafter be amended." (53 Stat. 1404; 45 U. S. C. Sec. 51.) (Italics supplied.)

Still further congressional recognition of the important distinction between the phrase "in commerce" and "affecting commerce" is expressed in the National Labor Relations Act.[9] For judicial recognition of the particularly broad jurisdiction conferred upon the National Labor Relations Board by the language "affecting commerce", see:

Apex Hosiery Co. v. *Leader,* 310 U. S. 469.

National Labor Relations Board v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 31.

Leader v. *Apex Hosiery Co.,* (C. C. A. 3rd) 108 Fed. (2d) 71, 81 (affirmed in *Apex Hosiery Co* v. *Leader, supra*).

Blankenship v. *Kurfman,* (C. C. A. 7th), 96 Fed. (2d) 450, 456.

Other federal legislation expressly providing for jurisdiction over intrastate situations affecting interstate commerce is contained in the Bituminous Coal Conservation Act[10] (see *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 387, 393) and the Agricultural Adjustment Act[11] (see *Mulford* v. *Smith,* 307 U. S. 38).

In clear contradistinction to the foregoing statutes governing activities both "in" and "affecting" interstate commerce, Congress in other enactments deliberately confined the scope of the legislation to persons "engaged *in* interstate commerce" or to transactions "*in* interstate

---

[9] 49 Stat. 450, 453; 29 U.S.C. Secs. 152 (6, 7), 160(a), fully set forth in Appendix D.

[10] 50 Stat. 85; 15 U.S.C. Sec. 834, fully set forth in Appendix D.

[11] 52 Stat. 38; 7 U.S.C. Sec. 1301 (a-4), fully set forth in Appendix D.

commerce." The Fair Labor Standards Act[12] applies to any employee "who is engaged in commerce or in the production of goods for commerce". The Act has been held not to include occupations affecting interstate commerce. *United States* v. *F. W. Darby Lumber Co.*, (D.C., S.D., Ga.) 31 F. Supp. 734, 737.

The Clayton Act prohibits price discriminations by "any person engaged in commerce, in the course of such commerce".[13] It has consistently been held that in order to come within the ambit of this statute the person charged with violation thereof must have committed a discriminatory act in the course of interstate commerce. Allegations in proceedings under the Clayton Act to the effect that the activities complained of affect interstate commerce are not sufficient. See:

Lipson v. *Socony Vacuum Corp.* (C.C.A. 1), 87 Fed. (2d) 265.

Lipson v. *Socony-Vacuum Corp.* (C.C.A. 1), 76 Fed. (2d) 213, 216, 217.

Port & Co. v. *Girdler*, (N. Y. Supreme Court, November, 1939), CCH Trade Regulations No. 25,347.

In *Schechter* v. *United States*, 295 U. S. 495, 542, 544, this court unmistakably announced that the statutory language "in commerce" has a connotation different from the words "affecting commerce." In that portion of the opinion which has been in no way modified by any later decisions of this court, it was clearly recognized that the statutory phrase "in commerce" restricts the scope of the statute to activities or situations in the current or flow of

---

[12] 52 Stat. 1060, 29 U.S.C. Sections 205, 207, fully set forth in Appendix D. See 75th Congress, 3rd Session, House Report 2182; 83 Congressional Record Page 9168.

[13] 38 Stat. 730; 15 U.S.C. Section 13, fully set forth in Appendix D.

interstate commerce while the term "affecting interstate commerce" confers powers also over intrastate activities or situations which have a direct and substantial relation to interstate commerce.

Other judicial statements to the same effect are found in *California Rice Industry* v. *Federal Trade Commission* (C.C.A. 9), 102 Fed. (2d) 716, 723; *Leader* v. *Apex Hosiery Co.* (C.C.A. 3), 108 Fed. (2d) 71, 81; *Blankenship* v. *Kurfman* (C.C.A. 7), 96 Fed. (2d) 450.

Petitioner contends that several decisions of lower federal courts have recognized that the Trade Commission is authorized to proceed against a concern which is not itself engaged in interstate commerce (Pet. Br. p. 13). The cases cited in support of this contention, however, demonstrate the contrary.

In *National Harness Mfrs.' Association* v. *Federal Trade Commission,* 268 Fed. 705, there existed a nationwide conspiracy between the members of the Association in violation of the Sherman Anti-Trust Act. The respondent, *Wholesale Saddlery Association,* consisted of persons and concerns engaged in selling harness and saddlery in interstate commerce throughout the various states and territories of the United States. The respondent, *National Harness Mfrs.' Association,* was composed of concerns who purchased their supplies of harness and saddlery from wholesalers and jobbers in interstate commerce, including members of the Saddlery Association. It was found that the officers and members of both associations co-operated by means of combinations and agreements extending throughout the various states to impose certain restrictions upon interstate business in harness and saddlery goods (p. 710).

Since it was expressly found that the members of the respondent associations were *actually engaged* in

interstate commerce, the ensuing statement of the court that interstate commerce was directly *affected* by the alleged unfair methods of competition was obviously unnecessary to the decision of the case. Moreover, when the portion of the opinion quoted by Petitioner is considered in its context, it appears that this language of the court was merely in reply to the contention that the challenged activities of the respondent association did not constitute *commercial* activities. In support of this statement the court referred to the cases of *Loewe* v. *Lawlor,* 208 U. S. 274, *Eastern States Lumber Co.* v. *United States,* 234 U. S. 600, and *Nash* v. *United States,* 229 U. S. 373, where it was held that persons conspiring with the intention of restraining interstate commerce are guilty of violating the Sherman Anti-Trust Act without being themselves engaged in a commercial occupation.

The second case cited by Petitioner in this connection, *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission* (C.C.A. 8), 13 Fed. (2d) 673, involved a proceeding by the Commission charging that the members of the Chamber were engaged in a conspiracy among themselves and with others to boycott and refuse to deal with the members and customers of the St. Paul Grain Exchange and of the Equity Co-operative Exchange. Against the contention of respondents in that case that the Chamber was not engaged in interstate commerce, the court held that that body was "*an instrumentality in the current of interstate commerce*" and, consequently, that its members were engaged in the operation of an instrumentality of interstate commerce. In so holding, the court cited and relied upon previous adjudications by this court to the effect that stock or commodity exchanges, stockyards, etc., constitute channels of the current of interstate commerce. Hence, the practices complained of in the *Chamber of Commerce* case occurred directly in the stream of inter-

state commerce which was handled and controlled *by the respondents themselves.*

Moreover, in the *Chamber of Commerce* case, the court found that the officers and members of the respondent organization were engaged in a conspiracy to restrain interstate commerce, thus directly contravening the prohibitions of the Sherman Act. The proceeding of the Commission thus being founded upon a violation of the Sherman Act, the court employed language which had been developed in a series of decisions applying the Sherman Act to certain intrastate activities. It is familiar doctrine that in circumscribing the scope of the Sherman Act with relation to intrastate activities, the courts have developed the criterion that the indicted intrastate activities must directly affect interstate commerce. Having held that the respondent organization and the members thereof were engaged in the operation of an agency of interstate commerce, which alone was sufficient to establish jurisdiction of the Commission, the subsequent language of the court quoted by Petitioner, finds its explanation in the existence of a conspiracy *affecting* interstate commerce.

In further support of its contention that the Trade Commission Act should be construed to embrace intrastate sales methods *affecting* interstate commerce, Petitioner relies on the case of *Houston, East & West Texas Ry Co.* v. *United States,* 234 U. S. 342, (Pet. Br. p. 16) wherein this court was called upon to construe the Interstate Commerce Act.

The Interstate Commerce Act (41 Stat. 474; 49 U. S. C. Sec. 1) applies generally "to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are carried under a common control, management, or arrangement for a continuous carriage or shipment; * * * " (Sec. 1 (1a), 49 U. S. C. Par. 1 (1a)).

Viewing common carriers as essential agencies for the movement of interstate commerce, Congress thus subjected all common carriers to the jurisdiction of the Interstate Commerce Commission.

Section 2 provides for the application of the Interstate Commerce Act to the transportation of passengers and property and transmission of intelligence. In a proviso to this section an exception is made with respect "to the transportation of passengers or property, or to the receiving, delivery, storage or handling of property, wholly within one state and not shipped to or from any foreign country from or to any place in the United States as aforesaid; * * *." The effect of this proviso is to exempt transportation which is established to be wholly within one state from the scope of the Act which, *a priori*, vests the Interstate Commerce Commission with jurisdiction over all transportation of passengers and property.

Thus, in the broad language of the Interstate Commerce Act is found express legislative sanction for the establishment and regulation of intrastate rates, unless such rates concern charges for transportation wholly intrastate, having no contact or connection with, or influence upon, the dominant interstate character of the common carrier.

In the case above cited (frequently referred to as the *Shreveport Rate Case*), the Interstate Commerce Commission, in a proceeding against the Houston, East & West Texas Railway Company and the Houston and Shreveport Railroad Company, found that the carriers maintained unreasonable rates in their interstate transportation from Shreveport, Louisiana, to various points in Texas. The Commerce Commission consequently established the maximum class rates for this interstate traffic. These interstate rates from Shreveport to certain points in Texas were higher than rates charged by the carriers for transportation between certain cities in Texas under substanti-

ally similar conditions and circumstances. The Interstate Commerce Commission found:

> "That thereby 'an unlawful and undue preference and advantage' was given to the Texas cities, and a 'discrimination' that was 'undue and unlawful' was effected against Shreveport."

The order of the Commission, therefore, first fixed and established the maximum class rates to apply to the interstate transportation of traffic from Shreveport, Louisiana, to named points in Texas. In connection with, and incidental to, this regulation of the interstate rates of the carriers, the order of the Commission directed the carriers:

> "to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged by the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable."

It is to be noted that the interstate as well as the intrastate traffic regulated by this order of the Commission was carried on with the same trains serving interstate as well as intrastate transportation, on the same tracks leading from points outside of Texas to cities in Texas and serving also as connections between those cities within the State of Texas which were mentioned in the order.

This background of the order in question is illuminated by the following passages from the opinion of the court:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its

paramount power, may prevent the *common instrumentalities of interstate and intrastate commercial intercourse* from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

"This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the *action of an interstate carrier* in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. *The use of the instrument of interstate commerce* in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." (pp. 353, 354) (Italics supplied.)

Having decided that the regulation of these intrastate rates was a necessary part of the regulation of the interstate rates and that such regulation came within the power which Congress had constitutionally vested in the Interstate Commerce Commission by Section 3 of the

Act (24 Stat. 380), the court proceeded to consider the effect of the proviso to Section 2, providing that the Act shall not apply to the transportation of passengers or property wholly within one state. The Commerce Court had held:

> "That this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the Act to regulate commerce, to exceed its constitutional power and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect of such matters as are here in dispute. If this construction be correct it follows that the proviso in no way prevents the application of the third section to the facts of this case, and, therefore, it was within the authority of the Commission to make the order in question." (205 Fed. 380, 384.)

This Court, in affirming the decision of the Commerce Court, held that the carriers, being instrumentalities of interstate commerce, were subject to the jurisdiction of the Commission and that their intrastate rates in question, giving undue preference to certain localities, came within the language of the third section of the Act. It said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier." (p. 356)

Since the proviso to the first section of the Act constitutes an exception to the power generally conferred upon the Commission by the third Section of the Act, the court gave

to it a strict construction as not derogating from the general powers of the Commission unless it should be shown to be applicable in letter as well as spirit.

> "These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." (p. 358)

In view of this reasoning of the court, the assertion of Petitioner that the considerations and the rule laid down in the *Shreveport* case apply, *a fortiori,* to the instant case (Pet. Br. p. 17) is, therefore, wholly unwarranted. Contrary to the Interstate Commerce Act, the Federal Trade Commission Act confers but a limited jurisdiction upon the Trade Commission. In construing the Trade Commission Act the court is required to consider not the effect of an exception to a general power vested in the Commission, but the meaning of that part of the statute which constitutes its grant of authority.

A railroad operating interstate occupies a significant and important position in the national economy. It is obliged to serve, at prescribed rates, anyone lawfully requesting its facilities. The basic structure of such institutions, both physically and financially, is determined by the interstate character of its business. Its rails or lines run continuously across state borders. Its stations house under one roof all of the employees and paraphernalia necessary to handle both interstate and intrastate transportation. The same freight depots receive, load and unload goods moving interstate and goods moving in in-

rastate journeys. Its round houses and switching equipment are similarly used and its rolling stock moves across tate lines with through passengers and freight and with assengers and freight of local destination. Its bonds nd debentures are sold upon the basis of its total earnngs. When, therefore, the Interstate Commerce Commision comes to determine railroad rates, it must consider he carrier as a whole, its cost of operation, its earnings nd its obligations. Considerations of the same import pply, essentially, to steamship lines, telegraph and telephone companies and other media of transportation and ransmission.

In F. D. G. Ribble, State and National Power Over Commerce (Columbia Legal Studies III, 1937), p. 161, the author comments on the *Shreveport Rate* case as follows:

> "The carriers involved were engaged in interstate commerce. Accordingly the decision only sustained the power of the Interstate Commerce Commission in dealing with interstate carriers. The Court rested heavily on this fact, saying, for example: 'Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.' And again it declared: 'We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms.' In relying on the decisions with reference to the Hours of Service Act and the Safety Appliance Act, the Court repeated its conviction as to the essential unity and inseparability of the interstate and intrastate transactions *of an interstate carrier.*" (Italics supplied.)

Because of the fact that the court, in the *Shreveport Rate* case, was concerned with interstate carriers which

used their common instrumentalities of interstate and intrastate transportation to discriminate in their rates for transportation over the same lines serving both interstate and intrastate commerce, against interstate business, and because of the different language of the Interstate Commerce Act, the *Shreveport Rate* case, therefore, cannot be relied upon to include within the scope of the Federal Trade Commission Act local sales methods which possess only an intrastate aspect.

Petitioner finally urges upon the court the case of *American Can Co.* v. *Ladoga Canning Co.* (C.C.A. 7), 44 Fed. (2d) 763, as an example of judicial construction of the Clayton Act which, at that time, prohibited price discriminations by any person engaged in interstate commerce, in the course of such commerce (Pet. Br. p. 18). Petitioner says that in that case the court construed the phrase "in the course of such commerce" as referring likewise to the commerce of the party receiving the benefit of the discriminatory price.

An analysis of the case shows that the court was concerned merely with the extent of the stream of commerce doctrine as applied to the commerce of the party which engaged in discriminatory practices. It appeared in that case that the defendant company discriminated in its sales to purchasers inside the state as well as outside the state. The greater part of its product was sold to the Van Camp Company which maintained a factory in the same state in which defendant's plant was located. The Van Camp Company used the cans purchased from the defendant for packaging food and in turn sold its product packed in said cans in interstate commerce, throughout the United States. The sales by the defendant which were alleged to be discriminatory thus initiated the interstate journey of defendant's product which was only temporarily interrupted by the process of filling the cans in Van-Camp's plant and

from there continued its interstate movement. The court's conception of the sale of the cans by the defendant as a part of an intended and continuous current of interstate commerce is expressed beyond doubt in the following part of its opinion:

> "The tin cans were useless save as they might be used as containers for food stuffs. Both parties knew they were to be so used. They were sold with the understanding that the purchaser would use them to distribute goods in interstate commerce." (P. 771.)

Moreover, in deciding that these sales by defendant were "in the course of interstate commerce", the court followed explicitly the stream of commerce doctrine laid down in *Stafford* v. *Wallace,* 258 U. S. 459, and *Swift* v. *United States,* 196 U. S. 375, and treated the packing industry of Van Camp as a channel or throat of commerce analogous to the stock yards. The *American Can* case, therefore, affords no basis for Petitioner's contention that defendant's intrastate sales were held to constitute sales in the course of interstate commerce because of their effect upon such commerce.

The foregoing discussion establishes that the Trade Commission Act cannot be applied in disregard of the recognized distinction between acts *in* and acts *affecting* interstate commerce. Since the statute under consideration confines the powers of the Commission to the prevention of the use of unfair methods of competition *in* interstate commerce, it confers no authority to regulate sales methods in an intrastate business which, at the most, can be said to *affect* interstate commerce. The authorities cited by Petitioner are wholly insufficient to sustain its position.

V.

EVEN IF THE WORDS "AFFECTING COMMERCE" COULD, BY JUDICIAL INTERPRETATION, BE READ INTO THE FEDERAL TRADE COMMISSION ACT, FEDERAL JURISDICTION DERIVED FROM THE COMMERCE CLAUSE EXTENDS TO SUCH INTRASTATE TRANSACTIONS ONLY AS DIRECTLY AFFECT INTERSTATE COMMERCE.

As Petitioner admits, the sales methods of Respondent do not come in conflict with competitors in a contest for business in which Respondent's activities pass beyond the boundaries of Illinois. Respondent's efforts to sell, innocent under Illinois law, are said to come within federal regulatory power only because they affect producers outside of the state who desire to compete for trade in the Illinois market.

Even if the authorities discussed under the preceding point to the effect that the language "in commerce" is not the equivalent of the broader term "affecting commerce" could be disregarded, Petitioner is found to be confronted by another doctrine of federal jurisprudence, the recognition of which must result in the disapproval of the cease and desist order under consideration in the instant case.

In determining how far federal jurisdiction derived from the Commerce Clause may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, it is to be observed that there is a necessary and well established distinction between direct and indirect effects. *Schechter* v. *United States,* 295 U. S. 495, 546-548. The reduction of the movement of goods in interstate commerce, if but an incidental result of activities confined wholly within the boundaries of a single state, is not sufficient to bring such intrastate activities within the reach of federal control. *Moore* v. *New York Cotton Exchange,*

270 U. S. 593, 604. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 80. *Levering & Garringues Co.* v. *Morrin*, 289 U. S. 103, 107. *United Leather Workers* v. *Herkert*, 265 U. S. 457, 470. *Ware & Leland* v. *Mobile County*, 209 U. S. 404, 413. *Anderson* v. *United States*, 171 U. S. 604, 615, 616. *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.* (C. C. A. 9), 98 Fed. (2d) 129, 131. *United States* v. *So. Cal. Wholesale Grocers Ass'n.*, (D. C. Cal.) 7 Fed. (2d) 944, 947. *Abouaf* v. *Spreckels Co.* (D. C., Cal.), 26 Fed. Sup. 830, 833. *Arthur* v. *Kraft-Phoenix Cheese Corp.* (D. C. Maryland), 26 Fed. Sup. 824, 825.

It is submitted that in no case has federal jurisdiction yet been upheld over transactions occurring within the confines of one state on the ground that they affected interstate commerce unless they fell within one or more of the following classes:

1. Where there existed an interference with, or an obstruction of, the operation of an instrumentality of interstate commerce.
2. Where there existed a combination or other concerted action with the intent to interfere with a business engaged in interstate commerce.
3. Where those charged with obstruction actually controlled the channels, or some essential part thereof, through which the stream of subjects of interstate commerce moves, thus possessing the power physically to arrest the progress of interstate commerce.
4. Where the local transactions sought to be controlled were so closely and inseparably commingled with the transactions in interstate commerce of the same person as to make regulation of the interstate transactions impossible without concurrently regulating the local transactions.

The case at bar obviously does not fall within any of the above classes of cases in which a direct relation between intrastate transactions and interstate commerce has been found to exist. The asserted reduction of the quantum of the interstate trade of Respondent's foreign competitors, is merely an incidental result of the preference of Illinois buyers for goods of the Respondent over the goods of such competitors. *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64, 80. *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 604. *United States* v. *So. Cal. Wholesale Grocers Ass'n.* (D. C., Cal.), 7 Fed. (2d) 944, 947.

Even in the thinking of the most ardent federalists, the sphere of federal influence is not unlimited. As this court said in *Schechter* v. *United States,* 295 U. S. 495, 546:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

VI.

THE INSUFFICIENCY OF THE COMMISSION'S FINDINGS OF FACT UPON WHICH THE COMMISSION'S RULING WAS PREDICATED, ALONE REQUIRES THE DISAPPROVAL AND REVERSAL OF THE CEASE AND DESIST ORDER.

When Petitioner asserts that "the court below did not question the validity of any of the Commission's findings of fact" (Pet. Br. p. 5), it states but a misleading half-truth. The Circuit Court of Appeals did not question the findings, not because it accepted them as true, but because

it believed that the appeal presented essentially a question of law as to the scope of the power of the Commission over intrastate sales methods.

An examination of the Commission's findings discloses that they are devoid of concrete instances showing that Respondent's sales methods under attack actually caused buyers to prefer Respondent's merchandise over, and to refrain from purchasing the goods of, interstate vendors. There are no findings demonstrating that the asserted decline in the business of certain out-of-state manufacturers was caused by Respondent's intrastate transactions. Instead, the findings of fact consist of vague and general statements which partake of the nature of pleadings rather than findings of fact (Rec. 11, 13).

Such unsatisfactory findings of the Federal Trade Commission have been sharply criticized and have led to the reversal of the Commission's cease and desist orders. See, *John Bene & Sons* v. *Federal Trade Commission* (C. C. A. 2d), 299 Fed. 468, 470, 471. *B. S. Pearsall Butter Co.* v. *Federal Trade Commission* (C. C. A. 7th), 292 Fed. 720, 722, 723. *Federal Trade Commission* v. *Curtis Publ. Co.*, 260 U. S. 568, 577, 580. *New Jersey Asbestos Co.* v. *Federal Trade Commission* (C. C. A. 2d), 264 Fed. 509, 510. *L. B. Silver Co.* v. *Federal Trade Commission,* (C. C. A. 6th) 289 Fed. 985, 990. *Curtis Pub. Co.* v. *Federal Trade Commission,* (C. C. A. 3rd) 270 Fed. 881, 885. Gerard C. Henderson, The Federal Trade Commission (1924), pp. 108, 116, 128, 328.

Petitioner predicates its contention that the order entered by the Commission was valid on the ground that Respondent's transactions in Illinois were in competition with the interstate commerce of Respondent's rivals. In the findings of the Commission, however, there is a complete absence of any facts establishing that the goods of the outside competitors were in interstate commerce at the

time of their contact with Respondent's sales methods. It is well established that the interstate character of a business ends when the goods have come to rest within the state and that thereafter they are treated like any merchandise which is handled within the state. See, *Atlantic Coast Line R. Co.* v. *Standard Oil Co. of Kentucky*, 275 U. S. 257, 267. *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A. 2), 264 Fed. 330. *Winslow* v. *Federal Trade Commission* (C. C. A. 4), 277 Fed. 206. *Lipson* v. *Socony-Vacuum Corp.* (C. C. A. 1), 87 Fed. (2d) 265, 266. *Corey* v. *Independent Ice Co.* (D. C. Mass), 207 Fed. 459, 463.

Because the findings of the Commission are insufficient both to constitute proper findings of fact and to lay jurisdictional foundation for the order of the Commission, under any theory of the Trade Commission Act, the cease and desist order was properly reversed by the Circuit Court of Appeals.

CONCLUSION.

Under the language of the statute under consideration, taken in its ordinary meaning, it is plain that Congress intended to empower the Trade Commission to prevent interstate activity, *i. e.*, an interstate "use" of unfair methods of competition. Had it been intended to legislate upon action intrastate which affected interstate commerce, language to express such purpose was available as is manifest from other Congressional enactments. Not only the language of the Act but subsequent developments in legislation concerning interstate commerce, clearly discernable at the time of the Wheeler-Lea Amendment, demonstrate this to be true. It seems inevitable, therefore, that this court, using canons of construction which have become law by its

own pronouncements, will not read into the Act the new meaning contended for by Petitioner,—a meaning not expressed and not intended.

It is believed that the Court will instantly perceive that the present appeal to its reviewing powers is, genuinely speaking, an attempt to achieve additional jurisdiction for the Commission through the judicial process rather than by legislative authority. As this Court said in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

It is respectfully submitted that the judgment of the Circuit Court of Appeals reversing the order of the Federal Trade Commission, should be affirmed.

THEODORE E. REIN,
SAMUEL G. CLAWSON,
Attorneys for Respondent.

THEODORE E. REIN,
Of Counsel.

BLANK PAGE

APPENDIX A.

REPORTS AND HEARINGS CONCERNING THE WHEELER-LEA AMENDMENT.

SENATE REPORT NO. 221

75TH CONGRESS, 1ST SESSION

March 19, 1937

Mr. Wheeler, from the Committee on Interstate Commerce, submitted the following

REPORT (To Accompany S. 1077)

****

"This bill, as reported by your committee, is identical to S. 3744, which was unanimously passed by the Senate on May 4, 1936. Hearings were held on S. 3744 during the Seventy-fourth Congress and the Committee made several amendments to S. 3744 as a result. All such (*page 1*) amendments and an additional amendment made on the floor of the Senate were adopted by the Senate last year and included in the present S. 1077 which is therefore reported without further amendment.

****

"Section 5 of the present act declares unlawful unfair methods of competition in commerce, and the pending bill amends that section by also declaring unlawful, unfair or deceptive acts and practices in commerce. Under the present act it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practices if it should develop in the proceeding that all competitors in the industry practiced the same methods, and the Commission may be ousted of

its jurisdiction, no matter how badly the public may be in need of protection from said deceptive and unfair acts. Under the proposed amendment the Commission would have jurisdiction to stop the exploitation or deception (*page 3*) of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices. It further appears that much time and money must now be expended in order to establish competition and to show injury to competitors, as the courts have held that competition and injury to the same must be established in order for the Commission to retain jurisdiction. Under the proposed amendment, if the Commission should have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is in the public interest that they be stopped, it could issue its restraining order without being put to the necessity of establishing competition and injury to such competition.

****

"Some objection was voiced in the committee to the use of the word 'acts' and the suggestion was made that the word 'methods' should be substituted for the word 'acts', or that the word 'acts' be eliminated entirely. After consideration the committee is of the opinion that, (*pages 3, 4*) since the powers of the Commission in this respect are injunctive rather than punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects and may be far reaching.

****

"Federal Trade Commission,
Washington, February 11, 1936.

"Hon. Burton K. Wheeler,
Chairman, Committee on Interstate Commerce,
United States Senate, Washington, D. C.

"Dear Mr. Chairman: With further reference to yours of the 4th instant, submitting copy of bill S. 3744, and advising that your committee would appreciate having the views of the Federal Trade Commission on this proposed legislation, I beg to report as follows:

****

"Section 2: This section amends section 5 of the present act, first, by adding the words 'deceptive acts and practices' (p. 3, lines 14, 20, 24-25), so that the first paragraph would read:

> 'That unfair methods of competition and deceptive acts and practices in commerce are hereby declared unlawful.'

"Without these amendatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty. However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it. In one case involving deceptive advertising in which the Commission had issued its order to cease and desist, the Supreme Court said:

> 'If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed.'

"In spite of the finding of the court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction (*page 5*) to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured by the deceptive advertisements."

HOUSE OF REPRESENTATIVES REPORT NO. 1613

75TH CONGRESS, 1ST SESSION

August 19, 1937

Mr. Lea, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT (TO ACCOMPANY S. 1077)

****

"GENERAL PURPOSE OF PROPOSED LEGISLATION

"Outside of procedural matters there are two general purposes of this legislation.

"The first is to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce.

"The second general purpose is to provide the Commission with more effective control in the exercise of its jurisdiction over false advertisements of food, drugs, devices, and cosmetics.

****

"By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

"This amendment will also enable the Commission to act more expeditiously and save time and money now required to show actual competition and the injurious effect thereon of the unfair methods in question.

"At the present time, both the investigation of unfair methods of competition and in actual proceedings after the issuance of a formal complaint, the Commission must develop this jurisdictional prerequisite, even though the methods or practices involve representations that are flagrantly false or deceptive and dangerously injurious to the purchasing or consuming public.

"Representatives of the Commission appearing before the committee stated that competition and injury to a competitor can be established in almost every case, but that considerable time and money must be expended in many cases in order to do so. Since it is the (*page 3*) purpose of Congress to protect the consumer as well as the honest competitor, the Commission should be empowered to prevent the use of unfair or deceptive acts or practices in commerce, regardless of whether such acts or practices injuriously affect a competitor."

HOUSE OF REPRESENTATIVES

75TH CONGRESS, 1ST SESSION

HEARING BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 3143

February 18 and 19, 1937

(*page 3*) STATEMENT OF HON. EWIN L. DAVIS, ACCOMPANIED BY MR. GARLAND S. FERGUSON, COMMISSIONER, AND MR. WILLIAM T. KELLEY, CHIEF COUNSEL, FEDERAL TRADE COMMISSION:

*****

"During the last Congress, the Senate, without objection, passed a bill which embraced all of the proposed changes which are in this bill, also proposed amendments to several other sections of the act, and Senator Wheeler has reintroduced in the Senate, practically the same bill, as passed by the Senate before. However, this bill introduced by Chairman Lea of your committee, as I stated before, relates only to section 5, and there is omitted from this bill several amendments to other sections proposed last year and which were considered by your committee last year. I think it proper to say that those proposed amendments are omitted from this bill with the approval of the members of the Commission, for whatever that may be worth.

"Those were all clarification amendments but as there was such a wide spread misunderstanding of the purpose and effect of some of those amendments, it was (*page 4*) thought by some that they were not of sufficient importance to provoke the controversies which

they did and were relatively unimportant as compared to the proposed amendments to section 5.

****

"Commissioner Davis. Yes. As I said, the first amendment to section 5 of the present act is the addition of the words: 'and unfair or deceptive acts and practices in commerce'.

"Found in lines 10 and 11 of the bill. In order to complete the amendment, the amendatory words 'unfair or deceptive acts and practices in commerce' are also found in line 5, and in lines 8 and 9 of page 2, and the words 'act or practice' are found in lines 3, 9, and 21 of page 3 and in line 12 of page 5.

"Those subsequent references are in order to carry out the idea all through the section.

"Without these mandatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty, However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it.

*****

(*page 5*) "Mr. Pearson. May I ask, Judge Davis, if I correctly understand this amendment, any practice which of itself would be unfair to a consumer in the absence of any competition would be brought within the jurisdiction of the Federal Trade Commission?

"Commissioner Davis. Yes, sir. In other words, the act itself says that we shall proceed in the public interest and no matter how fraudulent; no matter how vicious; no matter how burdensome or injurious to the public, an

unfair trade practice may be, under the interpretation of the court in the *Raladam Case,* we would be powerless to act and protect the public interest unless we could show that the respondent before us had competitors and had injured them.

(*page 6*) "Mr. Chapman. Judge Davis, do I understand that with this proposed amendment you could go into the question of false, deceptive, or misleading advertisements without showing unfair trade practices?

"Commissioner Davis. No, no; not at all. We say, Congressman Chapman, that there is no distinction between an unfair trade practice or an unfair or deceptive act; but it is the words 'method of competition' that they play upon all of the time—that we must prove that there is competition.

"Mr. Chapman. That is what I wanted to get at.

"Commissioner Davis. That is what they hide behind, and I want to say this in that connection, that rule is not required of any other agency of the Government. It is not required in the Packers' Act which gives the Secretary of Agriculture jurisdiction over unfair practices; and in fact this language here which we propose to insert is about the same as that in the Packers' Act, except it also has the words 'or oppressive.'

******

(*page 7*) "Mr. Kenney, well, would overcharging be an unfair practice under that act?

"Commissioner Davis. An overcharge?

"Mr. Kenney. Yes.

"Commissioner Davis. I do not think that that states sufficient facts upon which an opinion could be rendered.

"Mr. Kenney. Well, if a man makes a 1,000 percent profit on a given article he is selling, would the Commission look into his prices to find out whether he was guilty of unfair practices?

"Commissioner Davis. Well, of course, just on the very meager facts you give, that *probably would not involve interstate commerce.* Of course, we have no jurisdiction over any case in which interstate commerce is not involved. [Italics supplied.]

******

(*page 9*) "It is very rare that we have not been able, by diligent effort, to develop some competition, but as I say, it has been at an absolutely, as we conceive it, needless expense in order to prove an obvious fact upon a mere technicality instead of devoting the time of the Commission and of its staff and of the money which you appropriate for us, in investigating and preventing the things that this act is directed against, instead of dealing so largely with a mere technicality."

"Mr. Bulwinkle. But, has the Commission anybody in view that you would like to issue a cease and desist order against?

"Commissioner Davis. None whatever. It is not a personal matter at all. It is not anything of that kind, Congressman. It is a general proposition. And, by the way, this is no new proposition. The Commission has in effect in its annual reports and otherwise been making substantially the same recommendation for years; for years back. It is not anything new or a novel proposition.

HOUSE OF REPRESENTATIVES

74TH CONGRESS, 2ND SESSION

HEARING BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON S. 3744

May 27, 28 and 29, 1936

STATEMENT OF HON. EWIN L. DAVIS, COMMISSIONER, FEDERAL TRADE COMMISSION—Resumed.

(*page 13*) "Now, this amendment, frankly, we do not think makes any change at all in the actual operation, actual result, except to make unnecessary the most exacting and specific requirements of having to always approve competition and injury to competitors after all of the other elements in the case have been established."

APPENDIX B.

EXCERPTS FROM DECISIONS OF VARIOUS CIRCUIT COURTS OF APPEALS TO THE EFFECT THAT THE FEDERAL TRADE COMMISSION HAS NO JURISDICTION OVER INTRASTATE COMMERCE.

In *California Rice Industry* v. *Federal Trade Commission*, (C.C.A. 9th) 102 Fed. (2d) 716, the Trade Commission attempted to prohibit the fixing of quotas of rice that the respondents might mill or process. The court rejected the asserted jurisdiction of these intrastate practices saying, at page 723:

> "Undoubtedly the fixing of such quotas 'affects' the volume of rice which after milling is sold and delivered into interstate commerce, but unlike the National Labor Relations Act the Federal Trade Commission Act does not create a control in the Commission of practices both 'affecting' interstate commerce and 'in' interstate commerce. Since the Commission's authority is confined to transactions, 'in' interstate commerce, paragraph '5' of its order to cease and desist from 'fixing or determining the quotas or percentages of the rice crop that the Miller respondents may mill or process * * *' is beyond its jurisdiction and void."

In *Ward Baking Co.* v. *Federal Trade Commission* (C.C. A. 2d), 264 Fed. 330, there was an attempted exercise of jurisdiction over the practice of giving premiums in the sale of bread within the state of Rhode Island. Overruling the order of the Commission, the court said, at page 331:

> "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be inter-

state commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but *the method of local sales* made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, *this method of selling could not be considered interstate commerce.*" (Italics supplied.)

In *Winslow* v. *Federal Trade Commission* (C. C. A. 4th) 277 Fed. 206, the court considered certain unfair practices in the state of Virginia, which, according to the findings of the Commission, affected the interstate and foreign business of the respondents' competitors. The court held at page 209:

"In carrying on the business thus outlined, were the petitioners engaged in interstate or foreign commerce? This is the fundamental question to be determined, since if they were not, the commission was without jurisdiction. The claim that they were engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this transportation ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News. They are then incorporated in the general stock of merchandise there held for sale, and become subject, so far as now concerns us, to the exclusive jurisdiction of the state of Virginia. Their subsequent sale and delivery within that state, with which alone the condemned practices are connected, is in no sense interstate commerce. In short, it is quite beyond doubt that the jurisdiction of the commission over the matter in hand cannot be supported by the prior, but independent and completed transportation of the goods,

or some part of them, from another state. *Brown* v. *Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Robbins* v. *Taxing District*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694; *Wagner* v. *Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157; *American Harrow Co.* v. *Shaffer* (C. C.) 68 Fed. 750; *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A.) 264 Fed. 330, directly in point; *Roselle* v. *Commonwealth*, 110 Va. 235, 65 S. E. 526."

In *Utah-Idaho Sugar Co.* v. *F. T. C.* (C. C. A. 8th), 22 Fed. (2d) 122, the court said, at page 125:

"The acts to which the proof is directed, consisted in the effort of respondents to prevent competing factories being located in contiguous territory where they might absorb a part of the supply of beets to respondents' factories. It was at most a prevention of competition in the purchase of the raw material for manufacture within the state, and, in no case does the proof show an interference with the transport of beets from one state to another, or an interference with the purchase thereof."

In *Canfield Oil Co.* v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, the Trade Commission attempted to exercise jurisdiction over respondent's method of leasing tanks and pumps to distributors of gasoline, by which method respondent secured an unfair advantage over competitors engaged in interstate commerce. The court rejected the contention of the Commission stating, at page 574:

"It would therefore appear that this order of the Federal Trade Commission to cease and desist is based upon the theory that the petitioners in the marketing of gasoline and other oil products are engaged in interstate commerce. In view of the uncontradicted evidence and the stipulations and agreements of the par-

ties hereinbefore referred to, this theory is not tenable. On the contrary, this evidence and the agreements of the parties in reference to the facts affirmatively show that the sales business of the petitioners is purely and wholly intrastate. *Bowman, Atty. Gen.* v. *Continental Oil Co.*, 256 U. S. 642, 41 Sup. Ct. 606, 65 L. Ed. 1139, decided by the United States Supreme Court June 6, 1921.

"It is insisted, however, by counsel for the commission that there are a number of corporations, competitors of the petitioners, doing business within the state of Ohio, who are engaged in interstate commerce, and that therefore the Federal Trade Commission has jurisdiction to make these findings and order under the doctrine announced by the United States Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18, and *Railroad Co.* v. *U. S.*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, which latter case is commonly known as the Shreveport Rate Case.

"To this proposition there are two answers: (1) The findings and orders of the commission purport to regulate the business of the petitioners as interstate commerce, and not because the methods employed by petitioners in the conduct of intrastate business are discriminatory against, or a burden upon interstate commerce. (2) The evidence in these cases and the findings of fact made by the commission do not bring them within the purview of the cases above cited.

* * *

"The findings made by the commission in these cases do not show such an extraordinary condition of affairs, or any such direct burden, hindrance, or discrimination against interstate traffic, as would call for the exercise of federal control over purely intrastate business."

APPENDIX C.

REFERENCES TO THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT.

63rd Congress, Second Session. House of Representatives. Committee on Interstate and Foreign Commerce, Report No. 533. Report of Rep. Covington, to accompany H.R. 15613, part 1, page 2. Report of Rep. Lafferty, part 3, pages 1, 4. (House Reports, Vol. 2, 1913-1914.)

63rd Congress, Second Session. Senate Report 597. Senate Committee on Interstate Commerce. Report of Sen. Newlands, to accompany H.R. 15,613, pages 8, 13. Report of Sen. Cummins, page 32. Remarks of Sen. Newlands, page 38.

63rd Congress, Second Session. House of Representatives. Report No. 1142. Conference Report to accompany H.R. 15613 from the managers on the part of the House, pages 18, 19 (House Reports, Vol. 3, 1913-1914).

63rd Congress, Second Session. House of Representatives, debates on conference report submitted by managers of the House. 51st Congressional Record, part 15, pages 14919 *et seq.*, 14924-14943.

63rd Congress, Second Session. Senate Debates. Conference report submitted to Senate, 51st Congressional Record, part 15, pages 14764-14772-14782-14802.

W. H. S. Stevens, The Trade Commission Act. 4 American Economic Review, pp. 840 *et seq.* (1914).

James A. Fayne, The Federal Trade Commission: The Development of the Law Which Led to its Establishment. 9 American Political Science Review, pp. 57 *et seq.* (1915).

BLANK PAGE

APPENDIX D.

STATUTES REGULATING INTRASTATE SITUATIONS AFFECTING INTERSTATE COMMERCE.

NATIONAL LABOR RELATIONS ACT.

"*Powers of Board Generally.* The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (49 Stat. 453; 29 U.S.C. Sec. 160(a).)

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (49 Stat. 450; 29 U.S.C. Sec. 152 (6, 7).)

SECOND EMPLOYERS' LIABILITY ACT, AS AMENDED 1939.

"Every common carrier by railroad while engaging in commerce between any of the several States or

Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." (53 Stat. 1404; 45 U.S.C. Sec. 51.)

BITUMINOUS COAL CONSERVATION ACT.

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdi-

vision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of sections 831, 832 and 833." (50 Stat. 85; 15 U.S.C. Sec. 834.)

AGRICULTURAL ADJUSTMENT ACT.

"(4) The term 'affect interstate and foreign commerce' means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof." (52 Stat. 38, 202; 7 U.S.C. Sec. 1301(a4).)